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IN THE

Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,
PETITIONERS,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,
RESPONDENTS.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.
PETITIONER,

v.

BELL ATLANTIC CORPORATION, *et al.*,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE CONSUMER FEDERATION OF AMERICA AND VIRGINIA CITIZENS CONSUMER COUNCIL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE CIRCUIT COURT PAID LIP SERVICE TO THE PUBLIC'S RIGHT TO RECEIVE INFORMATION FROM DIVERSE SOURCES 4

II. THE COURT'S DETERMINATION THAT THERE IS AN "OBVIOUS LESS BURDENSOME ALTERNATIVE" TO THE TELCO/CABLE CROSS-OWNERSHIP BAN IGNORES PRACTICAL REALITIES 6

III. THE CIRCUIT COURT ERRED IN FINDING THAT RBOCs DO NOT HAVE AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION 9

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

Associated Press v. U.S.,
326 U.S. 1 (1945) 4

CBS Inc. v. FCC,
453 U.S. 367 (1981) 4

Chesapeake & Potomac Telephone Co. v. US,
42 F.3d 181 (4th Cir. 1994) . . . . . *passim*

Chesapeake & Potomac Telephone Co. v. US,
830 F.Supp 909 (E.D. Va. 1993) 5

United States v. O'Brien,
391 U.S. 367 (1968) 6

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 4

Turner Broadcasting Inc. v. FCC,
114 S.Ct. 2445 (1994) 4

United States v. Albertini,
472 U.S. 675 (1985) 6

STATUTES AND LEGISLATIVE MATERIALS

47 USC §522 (5) 9

47 USC §522 (6) 9

47 USC §531 10

47 USC §532 10

47 USC §534 10

47 USC §541(b) 9

H.R. 1555, 104th Cong., 1st Sess., §302(a) 6

S. 652, 104th Cong., 1st Sess., §206(b) 6

AGENCY DECISIONS

Fourth Report and Order, FCC No. 95-357
(Released August 14, 1995) 7

Video Dialtone Order, 7 FCCRcd 5781 (1992) 6

OTHER AUTHORITIES

Ameritech Goes Cable, Broadcasting & Cable,
July 3, 1995 at 6 8

D. L. Bazelon, *FCC Regulation of the Telecommunications Press*,
1975 Duke L.J. 213 (1975) 5

Bell Atlantic Changes its TV Plans -- Again, Washington Post, May
17, 1995 at F1 8

Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing The First Amendment Rights of Telephone Companies*, 70 North Carolina Law Review 1071 (1992) 5

FCC pondering franchise fees for telcos, Broadcasting & Cable,
July 3, 1995 at 23 9

Outlet Sells for $396 Million to NBC, Broadcasting & Cable,
August 7, 1995 at 64 5-6

Plan Stalls for Video Network, The Baltimore Sun, May 29, 1995

at 13C 7

SNET Fires Back at Connecticut Regulators[.] Connecticut Telco Holds Out Threat of Pulling Back from Video, Broadcasting & Cable, July 3, 1995 at 23 7-8

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INTEREST OF THE *AMICI CURIAE*

Consumer Federation of America (CFA) and Virginia Citizens Consumer Council (VCCC) submit this brief as *amici curiae* in support of Appellants United States of America and the National Cable Television Association.

CFA is the nation's largest consumer advocacy group, representing more than 50 million individual members from among 240 national, state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations. CFA has a longstanding interest in communications

policy issues. Its members' interests include, but go far beyond, the prices which small and residential customers pay for telecommunications services. CFA seeks to promote its members' access to information essential to their participation in the civic discourse which is at the heart of democratic self-governance. In this connection, it has advocated policies designed to ensure that all Americans have access to an affordable, state-of-the-art communications infrastructure to meet personal, educational, commercial and other national policy needs.

CFA has also participated in scores of federal and state proceedings addressing telecommunications policy issues, including proceedings before state utility commissions and the Federal Communications Commission ("FCC" or "Commission") affecting rates charged to consumers and access to basic telecommunications services. As an active party in FCC proceedings involving the prohibition of provision of video programming by telephone companies within their local exchange service areas (the subject of this litigation), CFA opposed the FCC's recommendation to Congress that it repeal these provisions, and took issue with some aspects of the "video dialtone" ("VDT") regulatory regime as devised by the FCC. CFA has long fought vertical integration in mass media and common carrier telecommunications services, including attempts of the Regional Bell Operating Companies ("RBOCs") and other monopoly telephone providers to integrate vertically into competitive markets at the expense of competition in those markets.

VCCC is a nonprofit, volunteer membership consumer advocacy organization that has represented consumer interests in Virginia since 1966. Its membership totals approximately 300 individuals and organizations. VCCC supports consumer protection legislation in the Virginia General Assembly and in Congress, participates in State Corporation Commission proceedings on utility, telephone, financial services and insurance issues, and provides information to its members and to the public on consumer issues and market surveys. VCCC has been significantly involved for several years in the development of telecommunications policy, both at the state and Federal levels, and is a leading advocate for telephone consumers in Virginia.

CFA and VCCC are filing this brief to set forth the interests and rights of members of the public - as speakers, as recipients of information and as customers. They believe that the telco/cable cross-ownership ban is a sound structural regulation that is narrowly tailored to meet the compelling governmental interest of ensuring diversity of voices and competition in the telecommunications and cable markets. There is not now, nor does it appear that there will be in the future, any viable and realistic alternative to this prohibition that can protect diversity and competition in the marketplace of services, or the marketplace of ideas.

SUMMARY OF ARGUMENT

The Circuit Court virtually ignored the public's "paramount" First Amendment right to receive information from diverse sources. While recognizing that government promotion of such interests is significant, the decision under review gave scant attention to these concerns in addressing whether the statutory provision at issue here is a narrowly tailored remedy.

First, the Circuit Court's exclusive concentration on the RBOCs' rights as speakers, without regard to the public's rights as recipients of information, was fundamental error. Second, the Court similarly erred in finding that there was an "obvious less burdensome alternative," to the cross-ownership ban. If the narrowly tailored analysis standard is to mean anything at all, the so-called "less burdensome alternative" must be real, and not theoretical. For this reason, the Court's reliance on the FCC's video dialtone scheme is misplaced. There is currently no viable VDT service. While a handful of test market installations serving perhaps several thousand people are now under way, it is far from certain that this technology will prove workable in a truly competitive market. Moreover, there is evidence that at least some of the RBOCs have no intention of providing such service, and that they are primarily interested in buying existing cable systems and monopolizing the video programming market.

Finally, the Court's determination that RBOCs lack "ample alternatives of communication" in their service areas is incomplete. The RBOCs can own and operate television stations and thereby

obtain cable access through "must carry" provisions of the 1992 Cable Act. They can deploy multi-channel "wireless cable" services and market their own programming to broadcasting, cable and direct broadcast satellite operators. They also have the option of leasing channels on cable systems.

ARGUMENT

I. THE CIRCUIT COURT PAID LIP SERVICE TO THE PUBLIC'S RIGHT TO RECEIVE INFORMATION FROM DIVERSE SOURCES.

The Circuit Court properly recognized that "'assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.'" *Chesapeake & Potomac Telephone Co. v. US*, 42 F.3d 181, 198 (4th Cir. 1994) (*"C&P Telephone"*) ***quoting*** *Turner Broadcasting Inc. v. FCC*, 114 S.Ct. 2445, 2470 (1994). As this Court held in its unanimous ruling in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969),

> It is the right of the viewers and listeners,...which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market....It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experience which is crucial here.

However, far from examining how the cross-ownership ban "properly balances" the First Amendment rights of the parties, *CBS Inc. v. FCC*, 453 U.S. 367, 397 (1981), and specifically whether it promotes the *public's* First Amendment right to receive information from diverse sources, *Associated Press v. U.S.* 326 U.S. 1, 20 (1945), the lower Court's analysis of narrow tailoring was conducted entirely from the perspective of how the ban may impact the rights of the RBOCs as speakers. *C&P Telephone*, 42 F.3d at 199-202.

Although the Circuit Court went so far as to accept that telephone companies have the incentive to act anticompetitively in the video program market to restrict diversity, *id.* at 200, and to

"assume that the possibility that a telephone company may engage in cross-subsidization in the cable transport market presents a problem," *id.* at 201, it went no further. Indeed, the Court's complete disregard for the public's right to diverse information is best demonstrated by the footnote following its "assumption." There, it echoed the District Court in stating that

> '[e]ven under the government's worse case scenario, in which the telephone companies succeed in driving out all competition for the provision of video transport service, the telephone companies would be in no better position to act anti-competitively in the video programming market than are the current monopolists in the video transport market, the existing cable operators.'

C&P Telephone, 42 F.3d at 201 n.31 ***quoting*** *C&P Telephone v. US*, 830 F.Supp. 909, 930 (E.D. Va. 1993).

The Circuit Court's callous disregard of the effects on diversity of replacing one monopoly with another clearly demonstrates that it did not properly consider the public's First Amendment rights in this case.[1] This inattention to diversity takes on greater meaning in the face of numerous recent media mergers[2]

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[1]*See also* Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing The First Amendment Rights of Telephone Companies*, 70 N.C.L. Rev. 1071, 1116-1119 (1992), which argues that the narrowly tailored test is ill-fitted for First Amendment cases in which the speaker is also a common carrier, because the test is premised "on the assumption that there are only two relevant parties-a speaker who wants to speak and a government that wants to limit that speech,..." while it ignores the interests of the telephone companies' customers, who have rights as speakers and receivers of information that will be burdened if telephone companies can monopolize their wires; D.L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213 (1975).

[2]Disney's proposed acquisition of the ABC television network, and Westinghouse Broadcasting's contract to buy the CBS television network are but two of the largest and most widely publicized transactions of the many recent and pending media mergers and consolidations. Barely no-

(continued...)

and Congressional proposals to permit further consolidation of control of the video programming and transport markets by eliminating broadcast multiple ownership and cross-ownership restrictions.[3]

II. THE COURT'S DETERMINATION THAT THERE IS AN "OBVIOUS LESS BURDENSOME ALTERNATIVE" TO THE TELCO/CABLE CROSS-OWNERSHIP BAN IGNORES PRACTICAL REALITIES.

The Circuit Court undertook an exceptionally superficial analysis of whether, under intermediate scrutiny, the telco/cable cross-ownership ban is narrowly tailored to meet that goal. It found that the ban was not narrowly tailored because, *inter alia*, an "obvious less burdensome alternative" to the ban "readily presents itself." *C&P Telephone*, 42 F.3d at 202 *citing Video Dialtone Order*, 7 FCCRcd 5781 (1992).

Even were this "alternative" already available, the mere possibility that such alternatives *might* develop does not get over the hurdle established by *United States v. O'Brien*, 391 U.S. 367 (1968). A regulation is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985). A restriction is permissible under *O'Brien* "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

But the "less burdensome alternative" identified by the Court - limiting RBOCs' editorial control over video programming to a fixed percentage of the channels available - is neither effective nor viable. It is in fact no alternative at all.

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[3](...continued)

ticed amid the attention to these transactions was NBC's acquisition - during the same week - of several major market TV stations for $396 million. "Outlet sells for $396 million to NBC," Broadcasting & Cable Magazine, August 7, 1995, at 64.

[3]See S. 652, 104th Cong., 1st Sess., §206(b) (1995); H.R. 1555, 104th Cong., 1st Sess., §302(a)(1995).

The FCC has considered and approved a few VDT applications. It has recently taken steps to expedite its processing of such submissions. *Fourth Report and Order*, FCC No. 95-357 (Released August 14, 1995). Even so, there are now but a handful of test market installations serving perhaps several thousand people. No one maintains that VDT technology is ready for large scale deployment, and it is far from certain that this technology will prove workable in a truly competitive market. Indeed, assuming all pending VDT applications are approved and fully constructed, they would reach perhaps 5% of all telephone subscribers.

Nor is it clear that VDT systems will ever be built at all. Just recently, "US West Inc. pushed back its bold interactive-network plans for up to a year, asking federal regulators to suspend review of five pending applications to build video networks." *US West Inc. Puts a Hold on Its Plans To Build Interactive Video Networks*, *Wall Street Journal*, June 1, 1995, at B2. The move came a week after "Bell Atlantic Corp. asked the FCC to suspend consideration of its two pending [VDT] applications,...saying it wanted to review new technologies in the market." *Id.* While "US West insisted it isn't abandoning plans to build an advanced communications network...," a US West executive "said he couldn't...rule out the possibility that US West may decide to follow in the footsteps of Bell Atlantic and withdraw its pending application completely." *Id.*[4] Shortly thereafter, NYNEX's Southern New

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[4]*See also Plan Stalls for Video Network*, *The Baltimore Sun*, May 29, 1995 at 13C. ["Bell Atlantic Corp. has formally withdrawn its application to the Federal Communications Commission for permission to build an advanced video network in Baltimore and five other metropolitan areas, saying it would file a new plan in late 1995 or early 1996. The company said it has withdrawn its original application because it was now technologically outdated. The decision to withdraw the so-called Section 214 application comes a month after Bell Atlantic asked the commission to put the matter on hold, saying it wanted to re-evaluate the system architecture. At the time, Bell Atlantic said it was having misgivings about its plans to build a system modeled upon cable television networks -- using both (continued...)

England Telephone subsidiary (SNET) "threaten[ed] to pull back its planned statewide construction of [a VDT network]...." *SNET fires back at Connecticut regulators[.] Connecticut telco holds out threat of pulling back from video*, *Broadcasting & Cable*, July 3, 1995 at 23. In exceptions to a state PUC's draft decision, SNET said that proposed cost-allocation procedures "would cause SNET to reconsider its entire...deployment plan, and specifically, its entry into the video market using an HFC architecture." *Id.*

Telcos have gone far beyond the exploration of other, non-VDT alternatives. Bell Atlantic and NYNEX have invested approximately 100 million dollars in a new wireless technology available for immediate deployment. This service, called MMDS, or "wireless cable," enables delivery of perhaps 100 TV channels almost immediately on current TV receivers.[5] Indeed, Ameritech was recently awarded a franchise to provide cable service in its telephone service area. *Ameritech goes cable*, *Broadcasting & Cable*, July 3, 1995 at 6.

What the RBOCs reticence (or inability) to operate VDT systems serves to highlight is that the "worst case scenario" the Circuit Court described is based in reality: some RBOCs may be

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[4](...continued)

traditional coaxial cable and advanced fiber-optic cable, and architecture known as hybrid fiber-coax."]

[5]*See Bell Atlantic Changes its TV Plans -- Again*, *Washington Post*, May 17, 1995 at F1. ["Once again, Bell Atlantic Corp. has changed the way it wants to give you television service. By the end of 1996, the local telephone provider hopes to compete against local cable operators by offering more than 100 channels of video programs to 70 percent of the homes in the Washington region. But the TV shows won't be coming over any lightning-fast fiber-optic network. Instead, Bell Atlantic plans to deliver them over the air to 18-inch home dishes via high-frequency microwave signals, using an existing technology popularly known as "wireless cable" TV. **** The signals would go over wireless cable networks owned by CAI Wireless Systems, the wireless cable firm that Bell Atlantic and another regional phone company, Nynex Corp., agreed to invest $100 million in last March."]

less interested in competing with cable operators, than with replacing them.

This problem will only become exacerbated, if, as expected, the FCC rules that RBOCs that provide programming on a VDT system are providing "cable service" under 47 USC §522 (5)-(6),[6] and therefore are required to obtain a franchise from the local franchising authority pursuant to 47 USC §541(b).[7] *FCC pondering franchise fees for telcos, Broadcasting & Cable,* July 3, 1995 at 23. It is inconceivable that any RBOC would choose to operate an open system under Title II if it is required in any event to get a franchise under Title VI. The FCC's decision would destroy any incentive to engage in VDT.

III. THE CIRCUIT COURT ERRED IN FINDING THAT RBOCs DO NOT HAVE AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION.

The Circuit Court also determined that the cross-ownership ban did not provide RBOCs with ample alternative channels for communication so as to survive intermediate scrutiny. *C&P Telephone*, 42 F.3d at 202-203. Although the Court recognized that RBOCs can own cable systems outside their service areas, it asserted that "the telephone companies remain unable to reach the audience of their common carrier subscribers should they so

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[6]47 USC §522(5) states: "the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system or (B) who otherwise controls or is responsible for, through any arrangement, the management an operation of such a cable system.

47 USC §522(6) states: "the term 'cable service' means- (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;..."

[7]That section states, in pertinent part, "a cable operator may not provide cable service without a franchise."

choose." *Id.* at 203.

Here again, the Court has ignored the reality of the video marketplace. There are many ways for RBOCs to obtain access to audiences within and outside their service areas. RBOCs can provide programming in their service areas through marketing it to cable operators, broadcasters, or direct broadcast satellite systems.[8] Indeed, given recent RBOC alliances with such programming experts as Capital Cities/ABC Television Network (soon to be owned by Disney, a prolific television and movie producer) and former CBS Television Network program chief Howard Stringer, there is no reason to believe RBOC programming will not be attractive to these outlets. Moreover, cable commercial leased access channels or public access channels are available on a nondiscriminatory basis to all video programmers that are unaffiliated with a cable operator. 47 USC §§531-532.

As noted above, RBOCs are not precluded from other forms of video distribution, and several have taken steps for immediate entry into video programming via "wireless cable." Moreover, there is no bar to telco ownership of broadcast licenses; like all commercial broadcasters, their stations are entitled to mandatory carriage pursuant to 47 U.S.C. §534.

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[8]The Circuit Court admits that the District Court made this observation and does not dispute it. Instead, it cites to a so-called "inconsistent statement" by the District Court that was raised in that Court's discussion of narrow tailoring. *C&P Telephone*, 42 F.3d at 202 n. 36.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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